IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. _____, Original.

STATE OF OHIO,

Plaintiff,

vs.

STATE OF KENTUCKY,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and under Title 28, United States Code, Section 1251 (a) (1).

QUESTIONS PRESENTED

1. What is the boundary line between the State of Ohio and the State of Kentucky?
2. What is the jurisdiction of the State of Ohio and the State of Kentucky over the Ohio River?

STATEMENT

At the time of the Revolutionary War the Commonwealth of Virginia owned or claimed all of the land which now comprises the states of Ohio and Kentucky, among others. Heeding the request of Congress, the Commonwealth of Virginia ceded to the United States in the year 1784 the following described land:

"... by these presents, convey, transfer, assign, and make over, unto the United States, in congress assembled, for the benefit of the said States, Virginia inclusive, all right, title and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, *situate, lying, and being, to the northwest of the river Ohio*, . . ." 1 Laws of the United States 472, 474 (1784). (Emphasis added)

This grant by Virginia is known as the "Cession of Virginia." On April 30, 1802, Congress carved out of the above described land the State of Ohio. The southern boundary of this state was described by Congress as: ". . . bounded on the east by the Pennsylvania line, on the south by the Ohio river, to the mouth of the Great Miami river . . ." 2 Stat. 173 (1802).

The State of Kentucky was not embraced in the land ceded by Virginia, but rather was formed from land retained by Virginia. On December 18, 1789, the legislature of Virginia passed an act enabling the then "district of Kentucky" to be formed into an independent state. See 1 Laws of the United States 673 (1789). This act, which is commonly referred to as the "Virginia-Kentucky Compact", defined the boundaries of the state to be formed as being the same as those of the district of Kentucky. 1 Laws of the United States 673, 674 (1789). In admitting Kentucky to statehood, Congress adopted as the new state's boundaries those of the district of Kentucky as they existed on December 18, 1789. See 1 Stat. 189 (1791). Consequently,

the State of Kentucky has for its northern boundary the Ohio River, for this was the northern boundary of the land retained by Virginia after its cession in 1784, and was the northern boundary of the State of Kentucky as it existed on December 18, 1790. Kentucky officially became a state on June 1, 1792. 1 Stat. 189 (1792).

The State of Ohio does now, and has always claimed and maintained that the boundary between it and the State of Kentucky is the northerly low water mark of the Ohio River, as that mark existed in the year 1792 when Kentucky became a state and that it has equal and concurrent jurisdiction with the State of Kentucky on and over the entire Ohio River. However, the State of Kentucky claims that the boundary between it and the State of Ohio is the present northern shore of the Ohio River and that it has exclusive jurisdiction on and over the entire Ohio River. The dispute between Ohio and Kentucky as to the location of the boundary is compounded by the increased elevation of the river due to the erection of dams, which have caused the river to permanently increase in breadth.

Kentucky's claim of ownership to the northern shore is evidenced by its boundary statute which reads in pertinent part:

"The boundary with Ohio, Indiana and Illinois begins at a point where a line running through the center of the Big Sandy River intersects the low water mark on the northern shore of the Ohio River; thence it runs in a westerly direction along the northern or northwestern shore of the Ohio, to a stake on the bank of the Ohio River . . ." Notes and Annotations to the Kentucky Revised Statutes (1942), Title I, Chapter 1, p. 2.

(Emphasis added)

Kentucky, by the aforesaid statute and acting through its officials and employees, has acted both to assert that the boundary between Ohio and Kentucky is the present north shore of the Ohio River and furthermore, has denied the

doctrine of concurrent jurisdiction. Kentucky attempts to require all Ohio residents who own boats docked in the Ohio River to have Kentucky boating licenses; therefore, Kentucky in effect denies both the legal ownership of the State of Ohio to the portion of the Ohio River north of the low water mark as it existed in 1792, and the doctrine of concurrent jurisdiction as pronounced in the case of *Wedding v. Meyler*, 192 U.S. 573 (1904).

Similar incidences of Kentucky's exclusive claim of ownership of all of the river and claim of exclusive jurisdiction over the river are evidenced by Kentucky's attempt to require all Ohio residents fishing in any part of the river to have a Kentucky fishing license.

An analogous situation has arisen regarding the sale of liquor from wharfs, docks, boats, and marinas attached to or connected with the north shore of the river. Kentucky is insisting that her liquor licensing requirements be met by such establishments and that such business pay certain Kentucky taxes. In this instance it is clear that Kentucky does not recognize any rights of Ohio to ownership of the territory north of the low water mark as it existed in 1792, and further, denies the existence of any concurrent jurisdiction over the river.

ARGUMENT I

THE STATE OF OHIO MAINTAINS THAT IT OWNS THAT PART OF THE OHIO RIVER WHICH IS NORTH OF THE NORTHERN LOW WATER MARK AS THAT MARK EXISTED IN THE YEAR 1792.

The analysis set forth in the "Statement of Facts", *supra*, revealed that the Commonwealth of Virginia originally owned or claimed all of the land that comprises the states of Ohio and Kentucky. That pursuant to the Cession of Virginia, Virginia granted to the United States all of the land owned by it ". . . situate, lying and being, to the northwest of the river Ohio . . ." 1 Laws of the United

States 473, 474 (1784). Thereafter, the State of Ohio was created by Congress who described Ohio's southern boundary as follows: "... on the south by the Ohio River; ..." 2 Stat. 173 (1803). Thus, the land retained by Virginia after the cession was bounded on the north by the Ohio River, and hence the southern boundary of the district of Kentucky, to which the State of Kentucky succeeded, was the Ohio River.

Like Ohio, the State of Indiana was formed from the land ceded by Virginia; therefore, it has for its northern boundary the Ohio River. See 3 Stat. 382 (1816), and 3 Stat. 399 (1816). Thus, a determination of the boundary between the states of Indiana and Kentucky would control the determination of the boundary between the states of Ohio and Kentucky.

This Court has twice spoken on the boundary between the states of Indiana and Kentucky. The first of these pronouncements was the case of *Handly's Lessee v. Anthony*, 18 U.S. 374 (1820), wherein the plaintiff claimed an island or peninsula in the Ohio River under a grant from the State of Kentucky and the defendant claimed said land under a grant from the United States as being part of Indiana. Thus, the question involved was whether the land was owned by the State of Kentucky or whether it was part of Indiana. In reaching this question the Court stated:

> "The question whether the lands in controversy lie within the State of Kentucky or of Indiana, depends chiefly on the land law of Virginia, and on the cession made by that State to the United States." 18 U.S. 374, 376.

In response to the question of whether Indiana owns to the low water mark of the river or whether Indiana's ownership stopped at a line reached by the river when at its medium height, the Court answered:

> "In pursuing this inquiry, we must recollect that it

is *not the bank of the river, but the river itself*, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying, and being, to the northwest of the river Ohio.'" *Handly's Lessee, supra*, at 379. (Emphasis added)

Having determined that the river, not the bank, was the boundary the Court continues:

> "If it be true, that the river Ohio, not its ordinary bank, is the boundary of Indiana, the limits of that State can be determined only by the river itself. *The same tract of land cannot be sometimes in Kentucky, and sometimes in Indiana, according to the rise and fall of the river. It must be always in the one State, or the other.*" *Handly's Lessee, supra*, at 382.
>
> (Emphasis added)

Although the Court examined the evidence concerning the location of the 1792 low water mark and also whether that mark was north or south of the land in question, and found that the land in question was owned by Indiana because it was located north of the low water mark, it remained for *Indiana v. Kentucky*, 136 U.S. 479 (1890), to clearly set forth the boundary.

In *Indiana v. Kentucky*, the Court was confronted with a dispute as to ownership of an island which at the time of the suit was located on the north side of the Ohio River. In finding that at the time when Kentucky became a State (June 1, 1792) the low water mark of the river was north of the island in question and thus Kentucky owned the island, the Court determined that the boundary between the states of Indiana and Kentucky was the low water mark of the Ohio River as that mark existed in the year 1792, and in this regard stated:

> ". . . If, when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the

river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. . . . Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river." Indiana v. Kentucky, 136 U.S. 479, 508 (1890). (Emphasis added)

The determination of the boundary between Indiana and Kentucky at the northerly low water mark of the Ohio River as that mark existed in 1792, should control in this dispute between Ohio and Kentucky because of the identical title relationship of the parties herein. The best available indication of this 1792 north low water mark is the detailed and monumented survey made by the Corps of Engineers U. S. Army, in the years 1896 to 1906 entitled "Ohio River Pittsburgh, Pa. to Mouth. In 260 Charts and Index Sheets, made under supervision of the Ohio River Board of Engineers on Locks and Dams by the District Engineer Office, Louisville, Ky., 1911-14, Revised 1929".

ARGUMENT II

THE STATE OF OHIO HAS EQUAL AND CONCURRENT JURISDICTION WITH THE STATE OF KENTUCKY OVER ALL OF THE OHIO RIVER, EXCEPT JURISDICTION INCIDENTAL TO THE SOVEREIGNTY OF THE SOIL UNDER THE RIVER AND STRUCTURES PERMANENTLY ATTACHED THERETO.

The State of Ohio has concurrent jurisdiction with the State of Kentucky over all of the Ohio River, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto.

This argument is founded on the explicit terms of the

Virginia-Kentucky Compact, which reads in pertinent part:

"III. *Seventh.* That the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and *the respective jurisdiction of this commonwealth, and of the proposed state, on the river aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.*" 1 Laws of the United States 673, 675 (1789). (Emphasis added)

The above-quoted language was interpreted by this Court in the case of *Wedding v. Meyler*, 192 U.S. 573 (1904). After first determining that this provision of the Virginia-Kentucky Compact was the law of the United States, the Court went on to say:

"... What the Virginia compact most certainly conferred on the states north of the Ohio was the right to administer the law below low-water mark on the river, and as part of that right, the right to serve process there with effect. *State v. Mullen*, 35 Iowa, 199, 205, 206. What more jurisdiction, as used in the statute, may embrace, or what law or laws properly would determine the civil or criminal effects of acts done upon the river, we have no occasion to decide in this case. But so far as applicable we adopt the statement of Chief Justice Robertson in *Arnold v. Shields*, 5 Dana, 18, 22, 30 Am. Dec. 669, 673: 'Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial, and executive—as that possessed by Kentucky over so much of the Ohio river as flows between them'.

"The conveniences and inconveniences of concurrent jurisdiction both are obvious, and do not need to be stated. We have nothing to do with them when the law-making power has spoken. To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction 'on' the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state. ..."

Wedding v. Meyler, *supra*, at 584-585.

From the foregoing it is amply clear that the State of Ohio has equal and concurrent jurisdiction with the State of Kentucky over all of the Ohio River, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto.

CONCLUSION

By prior jurisprudential commitments, the Court has provided available guidelines for the determination of the boundary between the states of Ohio and Kentucky.

There is equally well established precedent furnished by decisions of this Court applicable to the controversy between Ohio and Kentucky concerning jurisdiction over the Ohio River.

In the first instance Ohio claims the boundary to be the north low water mark in the Ohio River, as that mark existed in the year 1792. Kentucky by statute and acts of its officials obviously does not consider this to be the law.

Through the acts of Kentucky officials and employees, Kentucky is attempting to deny the jurisdictional rights of Ohio on and over the Ohio River.

In view of these facts the Governor and Attorney General, on behalf of the State of Ohio, respectfully urge this honorable Court that the motion for leave to file the complaint submitted herewith be granted.

Respectfully submitted,

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March 31, 1966.